No. 90-460

IN THE

Supreme Court of the United States

October Term, 1990

BRUCE E. WALLIS and KATE B. WALLIS,
Petitioners,

vs.

JUSTICE OAKS II, LTD., and
ALLEGHENY OAKS OF FLORIDA, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether the confirmation of a debtor's plan of reorganization, which is admittedly dispositive of claims between creditors and the debtor, is also *res judicata* of other claims asserted in a separate adversary proceeding as between creditors.

Certificate of Interested Persons

A. The parent corporation of Allegheny Oaks of Florida, Inc. is Allegheny International, Pittsburgh, Pennsylvania.

B. Other interested persons would include any parties to the Chapter 11 proceedings of Justice Oaks II, Ltd., case no. 86-1976, in the U.S. Bankruptcy Court for the Middle District of Florida, and any unsecured creditor of said respondent.

TABLE OF CONTENTS.

Page

TABLE OF AUTHORITIES.

CASE AUTHORITIES:

Page

U.S. CONSTITUTION:

FEDERAL STATUTES:

FEDERAL RULES:

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Opinions Below

The opinion of the court of appeals is reported at 898 F.2d 1544 (11th Cir. 1990), and set forth in Appendix A. The Court of Appeals' denial of the Motion for Rehearing is unreported and is set forth in Appendix B. The opinion of the district court is unreported and is set forth in Appendix C. The order of the bankruptcy court confirming the plan of reorganization on June 15, 1987, is unreported and is set forth in Appendix D. The order of the bankruptcy court dismissing the Wallises' separate adversary proceeding on March 10, 1988, is unreported and is set forth in Appendix E.

Jurisdiction

The opinion of the court of appeals was rendered on April 25, 1990 (Appendix A). A timely petition for rehearing was denied on June 13, 1990 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

Constitutional and Statutory Provisions

The statutes involved are:

1. "No person shall be ... deprived of life, liberty, or property, without due process of law ..." U.S. Constitution, Amendment V;

2. "... the court may under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim ..." 11 U.S.C. §510(c).

3. "... the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan." 11 U.S.C. §1141(a).

4. "Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12 or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims." 28 U.S.C. §157(b)(2).

5. "A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected." 28 U.S.C. §157(c)(1).

Statement of the Case

Petitioners (the "Wallises") originally brought this action pursuant to the provisions of 28 U.S.C. §1334, 28 U.S.C. §157(c) (a related non-core proceeding), and 11 U.S.C. §510(c). Their purpose is to secure an evidentiary hearing on the merits to equitably subordinate the claim of Allegheny Oaks of Florida, Inc. ("Allegheny") to the claims of the unsecured creditors of Justice Oaks II, Ltd. ("JOII"). The Wallises are the largest of such unsecured creditors.

In December, 1984, in hopes of preserving the quality of their residential community, the Wallises guaranteed a debt owed by their land developer, the now bankrupt defendant, JOII. The guaranteed debt was owed to The Park Bank of Florida, which was taken over by the Federal Deposit Insurance Corporation in 1986. After paying $60,000 in 1987 to preserve certain security, the Wallises settled that debt in March, 1990, by paying the FDIC $1.6 million in cash, $800,000 in interest-bearing notes, and by releasing certain limited liens on property in the development worth at least $2 million.

Allegheny was a general partner in JOII until December, 1984, when, as part of JOII's refinancing which included the Wallises' guaranteed debt, Allegheny redeemed its interest in the partnership in exchange for cash and a partnership note secured by a second mortgage in the development. When JOII went bankrupt in 1986, Allegheny, by virtue of its inequitable conversion of its investment into secured debt in December, 1984, when JOII was insolvent, listed that redemption note and itself as a secured creditor. As a result, in May, 1987, prior to the court ordered bar date, the Wallises filed and served an adversary proceeding in

the JOII bankruptcy, pursuant to 11 U.S.C. §510, to subordinate Allegheny's rights to the rights of the Wallises and the other unsecured creditors.

Prior to the Wallises filing their adversary proceeding, Allegheny and JOII, along with their principal lender, South Florida Savings & Loan ("SFSL"), arranged to sell the unsold portions of the residential land development to a third party for less than the amount of SFSL's first mortgage, let alone Allegheny's claimed second mortgage. Then, in order to create certainty among themselves, those entities consented to a settlement agreement by which SFSL got nearly all of the sales proceeds, less $1 million set aside for Allegheny; and they all exchanged mutual releases.

The Wallises were not parties to this settlement agreement reached by Allegheny, JOII, and certain of its creditors. The Wallises received notice that a settlement agreement among those parties had been reached. They were never advised that court approval of the settlement, granted in January, 1987, would also preclude any subsequent equitable action by them against these or other creditors. The settlement was incorporated into the debtor's plan which was confirmed in June, 1987 and resulted in the debtor's discharge (Appendix D) 11 U.S.C. §1141(a).

Thereafter, Allegheny filed a motion to dismiss the Wallises' adversary proceeding. Unexpectedly, at oral argument on Allegheny's Motion in November, 1987, the bankruptcy court determined that the Wallises were nonetheless bound to the settlement agreement's terms as the "law of the case", and, dismissed their complaint by order dated March 10, 1988 (Appendix E). Since the

plan had been confirmed the previous June, it was then too late to appeal that finding directly, and the Wallises' efforts at that time to appeal were deemed untimely.

The bankruptcy court, district court, and court of appeals have all made the same erroneous assumption that the Wallises seek to relitigate the claims of creditors against the debtor, JOII, which were the subject matter of the bankruptcy court's confirmation order. To the contrary, the Wallises do not challenge the plan, either directly or collaterally, because the $1 million fund, which is at the heart of this action between the Wallises and Allegheny, exists only by virtue of the confirmed bankruptcy plan of JOII. Rather, the Wallises argue, once Allegheny's claim was fixed by the agreement of JOII and the secured creditors in the settlement agreement, which became the basis of the confirmed plan, that the unsecured creditors' rights in the $1 million were superior to Allegheny's claim to the fund.

It is undisputed that the claims of Allegheny and all creditors against the debtor, JOII, are now resolved by JOII's confirmed plan and are subject to the doctrine of *res judicata*. At the same time, the claims of the Wallises against Allegheny in its claimed capacity as a creditor of JOII, which claims were not the focus of the bankruptcy court, have never been addressed on their merits. *Res judicata* is inapplicable to those claims.

The $1 million fund has been in an interest-bearing escrow account since 1987. Additionally, the Wallises have posted a $50,000 bond with the U.S. district court in Florida to secure this appeal to enforce their Constitutional rights to due process. The law, public policy, and simple justice demand that the Wallises be afforded the chance to demonstrate the merit of their claims. The matter is important to establish creditors' rights, *vis-a-vis* other creditors, in a bankruptcy context.

Reasons for Granting Writ

This petition presents an important issue regarding the doctrine of *res judicata* in a bankruptcy context, and discusses the apparent conflict between the 11th Circuit's decision, attached as Appendix A, and the 10th Circuit's decision in *Reliable Electric Co., Inc. v. Olson Construction Company,* 726 F.2d 620 (10th Cir. 1984), and the decisions of trial courts throughout the country.

The Wallises' Claim is Outside the Debtor's Plan:

Bankruptcy Judge Paskay's Order On Objection to Confirmation, attached as Appendix D, concerned itself primarily with the Wallises' efforts to maintain their partially secured status in two buildings in the development. In connection with the Wallises' collateral efforts to subordinate Allegheny's claims to their own unsecured claim, the court rather cursorily noted that:

> "The provisions of this Plan merely incorporate the terms of that compromise. For this reason it is now too late to challenge the propriety of the compromise."

The Wallises do not challenge the compromise. In fact, they support the compromise between JOII and Allegheny because it created the fund. But the compromise is not binding on the claims of the Wallises, who were not parties, against Allegheny, and the plan cannot be dispositive of those claims since the merits were not resolved by the settlement or the plan.

The Wallises' claims against Allegheny were not core claims in the JOII bankruptcy, and therefore could have been litigated in the district court. 28 U.S.C. §157(b)(2). At the same time, the bankruptcy court did have authority to try the matter and to render findings of fact

and conclusions of law. 28 U.S.C. §157(c)(1). The Wallises' claims were not compulsory counterclaims since the Wallises had asserted their claims under their own separately-numbered adversary proceeding. F.R.C.P. Rule 13. The logical analysis is that the Wallises' claims against Allegheny, in its capacity as a claimed creditor, were outside the mandatory jurisdiction of the bankruptcy court and, therefore, the mandatory realm of the plan.

Res Judicata:

Collateral estoppel does not apply under these facts since it is undisputed that the action has never been resolved on the merits. *Brown v. Felsen*, 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979). *Res judicata* precludes new litigation when the parties and claims are the same. It is inapplicable here for several reasons:

a. the Wallises assert a different cause of action. Their claim against JOII as guarantors sounds in their contract with JOII; their claim against Allegheny under 11 U.S.C. §510 sounds in equity as to the proper proprity of rights between creditors. Moreover, their claim to the fund could not even have formally arisen until after the plan was confirmed. *Wilson v. Turnage*, 791 F.2d 151, 156 (Fed. Cir. 1986); *C.D. Anderson & Co., Inc. v. Lemos*, 832 F.2d 1097, 1100 (9th Cir. 1987);

b. the Wallises were not parties to the settlement agreement and can not be bound. *Ethnic Employees of the Library of Congress v. Boorstin*, 751 F.2d 1405, 1409 (D.C. Cir. 1985);

c. a settlement agreement resulting in a consent decree is a bar only to matters actually litigated, not as to matters which could have been litigated. *In re Werth*, 37 B.R. 979 (Bkrtcy. D. Col. 1984); *In re Ivie & Associates, Inc.*, 84 B.R. 882 (Bkrtcy. N.D. Ga. 1988). The consent decree did not involve the Wallises, and certainly not their matter;

d. the Wallises' adversary proceeding was not *new* litigation, but was pending. *City of Cleveland, Ohio v. Federal Power Commission*, 561 F.2d 344, 348 n.39 (D.C. Cir. 1977); and

e. because the doctrine "shields the fraud and the cheat as well as the honest person," *res judicata* should "be invoked only after a careful inquiry." *Brown v. Felsen, supra*, 442 U.S. at 132. Careful inquiry demonstrates that the doctrine should *not* be invoked.

Due Process:

The 11th Circuit mistakenly held that the confirmation of the debtor's plan of reorganization, which merely incorporated the terms of the compromise to which the Wallises were not parties, and which was designed to affect the rights between the debtor and its creditors, also has a preclusive effect upon a *pending* adversary proceeding, under a separate cause number, seeking to determine rights solely between creditors. Such a preclusive effect denies fundamental rights of due process afforded under the Fifth Amendment.

Reliable Electric Co., Inc. v. Olson Construction Company, 726 F.2d 620 (10th Cir. 1984), held that the claim of a creditor, without notice of a hearing, is not

barred, based on the Fifth Amendment, by the confirmation of a plan. How different can the Constitutional violation be if a party is noticed to raise his claims against the *debtor*, but then is forever barred from prosecuting a pending action against another *creditor*? The Wallises notice was wholly insufficient. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Moreover, the other creditors and the debtor were on notice that there had been no disposition of the Wallises' action, and that there would have to be such a resolution beyond the settlement and confirmation hearings. *In re Stein*, 63 B.R. 140 (Bkrtcy. D. Neb. 1985).

The Constitution provides an exception to bankruptcy discharge; specifically, that due process is required. *City of New York v. New York, New Haven & Hartford Railroad Company*, 344 U.S. 293, 297, 73 S.Ct. 299, 97 L.Ed. 333 (1953); *In re Nevada Emergency Services, Inc.*, 39 B.R. 859 (Bkrtcy. D. Nev. 1984). Due process was here denied. A settlement agreement to which the Wallises were not parties was approved in January, 1987. In May, 1987, the Wallises timely filed their adversary proceeding against Allegheny. In June, 1987, the plan was confirmed disposing of the claims between the debtor and the creditors. Allegheny then filed a motion to dismiss which was heard in November, 1987, and resulted in an order in March, 1988, that the Wallises' claims were barred because of the "law of the case." Bankruptcy Judge Paskay stated the claim had previously been addressed when he approved the settlement agreement (even though the Wallises were not parties) which was incorporated in the confirmation order, and which order was then final and unappealable.

The issue is whether due process was afforded. It was not afforded, first because the adversary complaint was separate from the confirmation proceedings and involved separate parties and claims. Second, even if that were not so, due process would require notification to the Wallises of the disposition of their rights at a time when they could have appealed the confirmation order. Allegheny's filing of a motion to dismiss which was not heard until five months after confirmation, and not decided until four months after that, is simply insufficient.

Exceptions to Preclusive Effects of Res Judicata:

In the case of *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 101 S. Ct. 2424, 69 L.Ed.2d 103 (1981), Justices Marshall and Blackmun stated they "would not close the door upon the possibility that there are cases in which the doctrine of res judicata must give way to . . . overriding concerns of public policy and simple justice." 452 U.S. at 402-03. They cite Professor Moore for the proposition that the doctrine is sometimes qualified by public policy and that it sometimes needs equitable tempering. *Id.* Public policy and simple justice should favor the equitable rights of creditors to equitably subordinate the claims of others, and the right to prove those claims after proper notice.

Conclusion

Based on the foregoing, Mr. and Mr. Bruce E. Wallis pray the Court to grant their petition for certiorari, and for general relief.

Dated: Buffalo, New York
September 7, 1990

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the Eleventh Circuit Dated April 25, 1990

In re JUSTICE OAKS, II, LTD.
Chapter 11, Debtor.

BRUCE WALLIS, KATE WALLIS,
Plaintiffs-Appellants,

v.

JUSTICE OAKS, II, LTD.,
Defendant-Appellee.

No. 89-3016.

United States Court of Appeals,
Eleventh Circuit.

April 25, 1990.

Guarantors brought adversary proceeding against debtor and mortgagees seeking equitable lien and equitable subordination, and objected to mortgagee's claim. The United States Bankruptcy Court for the Middle District of Florida dismissed adversary complaint, denied guarantors' motion to require maintenance of funds in escrow, and overruled objection to claim. The United States District Court for the Middle District of Florida, Docket Nos. 87-1611-CIV-T-10, 88-547-CIV-T-10 and 88-1136-CIV-T-10, Wm. Terrell Hodges, J., affirmed, and guarantors appealed. The Court of Appeals, Tjoflat, Chief Judge, held that: (1) order authorizing settlement of claims by creditors was

not "final judgment on the merits," and thus could not be given preclusive effect; (2) claims by guarantors were, or could have been, raised in guarantors' objection to confirmation of Chapter 11 plan, and thus, doctrine of claim preclusion barred them from relitigating claims in adversary proceeding; and (3) guarantors of debt waived right to object to mortgagee's claim on ground that plan misclassified claim as secured by failing to object prior to confirmation of plan.

Affirmed.

1. **Judgment** ⇐636

Bankruptcy court's order authorizing settlement of claims by creditors was not "final judgment on the merits," and thus could not be given preclusive effect.

See publication Words and Phrases for other judicial constructions and definitions.

2. **Judgment** ⇐650

Court's order or judgment can never have preclusive effect on future litigation unless order or judgment is final decision on merits.

3. **Courts** ⇐99(1)

Judgment ⇐713(2), 720

While "law of the case" does not bar litigation of issues which might have been decided but were not, it does require court to follow what has been decided explicitly, as well as by necessary implication, in earlier proceeding; distinction between law of the case and "claim preclusion" is that former bars relitigation of legal rules while latter bars relitigation of claims and bars relitigation not only of claims raised but also of

claims that could have been raised, applying to proceedings in different causes of action, unlike law of the case, which applies to proceedings within the cause of action.

See publication Words and Phrases for other judicial constructions and definitions.

4. **Bankruptcy** ⇐3033

When bankruptcy court decides whether to approve or disapprove proposed settlement, it must consider probability of success in litigation; difficulties, if any, to be encountered in matter of collection; complexity of litigation involved, and expense, inconvenience in delay necessarily attending it; and paramount interest of creditors and proper deference to their reasonable views.

5. **Judgment** ⇐634

Claim preclusion applies to order or judgment when prior judgment is valid in that it was rendered by court of competent jurisdiction and in accordance with requirements of due process, judgment was final and on merits, there was identity of both parties or their privies, and the later proceeding involves same cause of action as earlier proceeding. U.S.C.A. Const. Amends. 5, 14.

6. **Judgment** ⇐636

Bankruptcy court's order confirming Chapter 11 plan satisfied all four requirements for claim preclusion with regard to adversary proceeding brought by guarantors against debtor and mortgagees seeking equitable lien on proceeds from sale of debtor's property and seeking to have claims equitably subordinated; guarantors' objection to plan was considered by bankruptcy court, guarantors took advantage of opportunity to participate

in hearing, and all guarantors' claims in adversary proceeding were based on same transaction, allegedly fraudulent buy-out of mortgagee's partnership interest, that gave rise, in part, to terms of plan. Bankruptcy Rule 3020(b), 11 U.S.C.A.; Bankr. Code, 11 U.S.C.A. §1128.

7. Judgment ⇐713(2), 720

Claims by guarantors in adversary proceeding seeking equitable lien and equitable subordination that mortgagee engaged in fraudulent and inequitable conduct and that mortgagee was not secured creditor since it was seeking to recover its investment or capital contribution in Chapter 11 debtor were, or could have been, raised in guarantors' objection to confirmation of Chapter 11 plan, and thus, doctrine of claim preclusion barred guarantors from relitigating claims in adversarial proceeding; objection to confirmation was overruled, and guarantors failed to appeal. Bankruptcy Rule 3020(b), 11 U.S.C.A.; Bankr.Code, 11 U.S.C.A. §1128.

8. Judgment ⇐660

Assuming all other requirements are satisfied, erroneous former judgment from which no appeal was taken may still have preclusive effect.

9. Federal Civil Procedure ⇐1754

Adversary complaint by guarantors seeking equitable lien or equitable subordination was subject to dismissal as being premature, where guarantors, who had not yet become liable on guarantee, did not have allowable claim. Bankr.Code, 11 U.S.C.A. §§502(e))1), 510.

10. **Bankruptcy** ⇐3566

Guarantors of debt waived right to object to mortgagee's claim on ground that Chapter 11 plan misclassified claim as secured by failing to object prior to confirmation of plan. Bankr.Code, 11 U.S.C.A. §502(a); Bankruptcy Rule 3007, 11 U.S.C.A.

11. **Bankruptcy** ⇐3566

When objection to claim is based on argument that reorganization plan misclassified objectionable claim, objection must be made prior to confirmation of plan. Bankr.Code, 11 U.S.C.A. §502(a); Bankruptcy Rule 3007, 11 U.S.C.A.

S. Thomas Padgett, Keego Harbor, Mich., for plaintiffs-appellants.

Shirley Arcuri, Tampa, Fla., George L. Cass, Pittsburg, Pa., for defendant-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT, Chief Judge,
HATCHETT, Circuit Judge, and
MORGAN, Senior Circuit Judge.

TJOFLAT, Chief Judge:

Bruce and Kate Wallis (the Wallises) appeal the district court's order affirming three separate orders entered by the bankruptcy court in *In re Justice Oaks II, Ltd.*, No. 86-1976-8P1, a reorganization of Justice Oaks II, Ltd. (Justice Oaks) under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§1101-1174 (1988). The three bankruptcy court orders were consolidated for the purpose of appeal to the district court. The district court affirmed the bankruptcy court orders on the ground of

res judicata, holding that the Wallises' claims were barred by prior orders of the bankruptcy court. We disagree, in part, with the district court's reasoning but nevertheless affirm the district court and, by operation of law, the bankruptcy court.

I.

Justice Oaks, a limited partnership, owned a large residential development in Sarasota County, Florida. When the development failed, Justice Oaks filed, on May 15, 1986, a petition for reorganization under chapter 11. At that time, Justice Oaks had four potential major creditors:

1. *South Florida Savings Bank (South Florida).* South Florida held a first mortgage on all of Justice Oaks' property, with the exception of a guest house and an administration building in the development. The mortgage was South Florida's security for a $27 million loan to Justice Oaks.

2. *Allegheny Oaks of Florida, Inc. (Allegheny).* Allegheny, a former general partner of Justice Oaks, held a mortgage second in priority to South Florida's first mortgage on the majority of Justice Oaks' property. The second mortgage was Allegheny's security for Justice Oaks' promissory note to Allegheny in the amount of $7,334,746.

3. *Park Bank of Florida (Park Bank)/FDIC.* Park Bank, now succeeded by the FDIC, held a mortgage on the guest house and administration building as security for its loan to Justice Oaks in the amount of $4,500,000.

4. *Bruce and Kate Wallis.* The Wallises personally guaranteed Park Bank's loan to Justice Oaks, but the Wallises' liability on that guarantee appears to have been limited to $3,000,000.

On November 11, 1986, the Wallises filed a proof of claim asserting that, on the basis of their personal guarantee of the Park Bank loan, Justice Oaks "was at the time of the filing of the Petition initiating this case, and still is, contingently indebted to this Claimant in the sum of $4,500,000 plus interest." Significantly, neither Park Bank nor its successor, the FDIC, has foreclosed on the mortgage; therefore, the Wallises were not then, and are not now, indebted to Park Bank or the FDIC on the guarantee.

After several creditors had filed proofs of claims, Justice Oaks, Justice, Inc. (Justice) (Justice Oaks' parent corporation), Allegheny, and South Florida entered into negotiations to settle the various claims against Justice Oaks. The parties agreed that Justice Oaks would sell its property, with the exception of the guest house and administration building, to Arvida Disney Corporation for $25.7 million; $3.7 million would be paid at closing, and the remainder would be paid under a six-year purchase-money note. Arvida would also secure its obligation to Justice Oaks with a first mortgage on all of the property. Upon closing, Justice Oaks would apply the $3.7 million cash proceeds as follows:

1. $1,000,000 to Allegheny in full satisfaction of Justice Oaks' promissory note to Allegheny;
2. $25,000 for tax liabilities;
3. $50,000 for administrative expenses;
4. $100,000 to all unsecured creditors; and
5. the remainder to South Florida.

Furthermore, Justice Oaks would deliver Arvida's promissory note and mortgage to South Florida, and, in exchange for the cash, note, and mortgage, South Florida

would release Justice Oaks from its debt to South Florida. Thus, Arvida would receive the Justice Oaks property free and clear of all liens.

On December 3, 1986, Justice Oaks moved the bankruptcy court to hold an expedited hearing on the proposed sale to Arvida, shorten notice, and approve the sale. The next day, the court granted the motion to shorten notice and scheduled the hearing for December 12. The Wallises received notice of this order. On December 8, Justice Oaks moved the court to authorize settlement of the claims, as outlined above, and requested that the hearing on this matter be held on December 12 as well. The hearing took place on December 12, and the court granted the motion to sell the property to Arvida free and clear of all liens and authorized the parties to settle the claims as discussed above. Apparently, the Wallises did not appear at this hearing but received notice of the court's orders.

On January 20, 1987, Justice Oaks filed an amended proposed plan of reorganization (plan), which essentially restated the settlement agreement. The plan set out various classes of creditors and proposed the following disposition of funds:

1. South Florida to receive cash, note, and mortgage from sale of property to Arvida;

2. Allegheny to receive $1,000,000;

3. FDIC, as successor to Park Bank, to receive the guest house and administration building free and clear of all liens; and

4. all contingent creditors, including the Wallises, to receive nothing.

South Florida, Allegheny, and the FDIC were classified as secured creditors, while the Wallises were listed as unsecured creditors.

On May 15, 1987, after receiving notice of the plan, the Wallises filed (1) a clarified proof of claim, which stated that the claim was not contingent, and (2) an objection to confirmation of the plan. In their objection to confirmation, the Wallises asserted that Rodney Propps, a general partner of Justice Oaks, made several fraudulent misrepresentations in order to convince them to guarantee the Park Bank loan. The Wallises alleged that these misrepresentations were part of a scheme involving Propps, Justice Oaks, Allegheny, and South Florida that was designed to raise sufficient funds to buy out Allegheny's partnership, interest in Justice Oaks. Thus, the Wallises argued that the plan was not fair or equitable since it proposed large payments to Allegheny and South Florida while leaving the Wallises liable for any deficiency resulting from the FDIC's sale of the guest house and administration building.

On May 15, 1987, the Wallises filed in the bankruptcy court an adversary complaint against Justice Oaks, South Florida, and Allegheny. The Wallises filed an amended complaint on June 8, 1987 against the same parties. The amended complaint essentially restated the factual allegations contained in the Wallises' objection to confirmation but requested two different remedies. First, it asked the court to declare an equitable lien in favor of the Wallises on the proceeds from the sale to Arvida "in the amount equal to [the Wallises'] liability on the guaranties." Second, it requested the court equitably to subordinate, under 11 U.S.C. §510, Allegheny's and South Florida's claims to the Wallises' own claim.

On June 15, 1987, Allegheny filed a motion to dismiss the Wallises' adversary complaint. Allegheny argued, *inter alia*, that, because the Wallises had not been required to pay anything on their guarantee of the Park

Bank loan, they had no claim and therefore could not request subordination or an equitable lien. On the same day, the bankruptcy court overruled the Wallises' objection to confirmation of the plan. The court held that its order authorizing Justice Oaks to settle Allegheny's and South Florida's claims established the law of the case and that the Wallises, who had not objected to the proposed settlement, could not object to the plan, which was essentially a restatement of the settlement agreement. The court then confirmed the plan, and the Wallises filed an appeal in the district court. The district court dismissed the appeal because the Wallises failed to file their notice of appeal within ten days of entry of judgment. *See* Bankr.R. 8002(a) & advisory committee note.

On June 3, 1987, the Wallises moved the bankruptcy court to maintain in escrow the cash proceeds from the sale of Justice Oaks' property to Arvida. The Wallises argued that it would be improper to allow those funds to be disbursed to Allegheny and South Florida while the adversary proceeding against those parties was pending. On July 31, 1987, the court denied this motion, and the Wallises again appealed to the district court. Shortly after the bankruptcy court denied this motion, the Wallises dismissed South Florida from the adversary proceeding and dropped their objection to disbursement of funds to South Florida.

For the next several months, the Wallises filed numerous motions for rehearing and reconsideration, appeals, and motions to stay payment to Allegheny pending resolution of the other motions and appeals. Finally, on February 4, 1988, the bankruptcy court established February 19, 1988, as the last day on which a creditor or interested party could object to a previously

filed claim. Not surprisingly, on February 16, the Wallises filed an objection to Allegheny's claim and, on February 24, filed an amended objection. The Wallises, relying on essentially the same factual allegations as contained in the adversary complaint and objection to confirmation, argued that Allegheny's claim arose out of the redemption of its partnership interest in Justice Oaks and therefore represented a return on investment rather than a secured claim. On March 10, 1988, the bankruptcy court dismissed the Wallises' adversary proceeding. The court reasoned that all of the issues raised in the complaint had been considered by the court when it authorized settlement and confirmed the plan. And on May 12, 1988, the bankruptcy court overruled the Wallises' objection to Allegheny's claim, holding again that the allowance of Allegheny's claim had been finally determined in the court's orders authorizing settlement and confirming the plan. In both the proposed settlement and the proposed plan, Allegheny's claim was treated as a secured creditor's claim. Apparently, the court considered the Wallises' objection and adversary complaint to be barred by the law of the case. The Wallises appealed these orders to the district court.

On appeal to the district court, three of the bankruptcy court's orders were consolidated: (1) the order dismissing the Wallises' adversary complaint, (2) the order denying the Wallises' motion to require maintenance of funds in escrow, and (3) the order overruling the Wallises' objection to Allegheny's claim. The district court agreed with the bankruptcy court on all counts. According to the district court, the Wallises should have objected to the motion to approve the proposed settlement and should have appealed the bankruptcy court's order authorizing settlement. Their failure to do so resulted in a final judgment that barred their later attempts to

pursue their claims. Thus, the court affirmed all three orders on the ground of res judicata. The Wallises appeal, and we affirm.[1] We address each order in turn, beginning with the order dismissing the Wallises' adversary complaint.

II.

As we note above, both the bankruptcy and district courts held that former adjudication barred litigation of the Wallises' adversary proceeding against Allegheny. The courts gave preclusive effect to the bankruptcy court's (1) order authorizing settlement and (2) order confirming the plan. We analyze both orders in turn to determine their preclusive effect.

A.

[1-3] We need not tarry over the bankruptcy court's order authorizing settlement since that order does not constitute a final decision on the merits. A court's order or judgment can never have any preclusive effect[2] on future litigation unless that order or judgment constitutes a final decision on the merits. *See Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970); *United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 198, 70 S.Ct. 537, 544, 94 L.Ed. 750 (1950); *Jones v. Texas Tech Univ.*, 656 F.2d 1137, 1141 (5th Cir. Unit A Sept. 1981).

[1] Holding a claim to be barred from relitigation on the ground of res judicata is a determination of law. "This [c]ourt's standard of review with regard to determinations of law, whether made by the bankruptcy court or by the district court, is *de novo*." *Equitable Life Assurance Soc'y v. Sublett (In re Sublett)*, 895 F.2d 1381, 1383 (11th Cir. 1990). We therefore review the district court's judgment and the three bankruptcy court orders *de novo*.

[2] *See infra* note 3 (describing the different types of preclusive effect a judgment can have).

[4] When a bankruptcy court decides whether to approve or disapprove a proposed settlement, it must consider:

> (a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Martin v. Kane (In re A & C Properties), 784 F.2d 1377, 1381 (9th Cir.) (quoting *In re Flight Transp. Corp. Sec. Litig.*, 730 F.2d 1128, 1135 (8th Cir. 1984), *cert. denied*, 469 U.S. 1207, 105 S.Ct. 1169, 84 L.Ed.2d 320 (1985)), *cert. denied*, 479 U.S. 854, 107 S.Ct. 189, 93 L.Ed.2d 122 (1986).

When the bankruptcy court below approved the settlement agreement between Justice Oaks, Justice, South Florida, and Allegheny, the court was required to determine only the probability of success should South Florida's and Allegheny's claims be litigated, the difficulty of collecting on those claims, the expense of litigation, and the other creditors' interests. In making these determinations, the court had to consider many factors other than the merits of South Florida's and Allegheny's claims. The court, moreover, never had to *decide* the merits of those claims—only the *probability* of succeeding on those claims. Such a determination is much like that required of a court before it may grant a preliminary injunction. *See Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979). And the Supreme Court has held an order granting a preliminary injunction not to be a final judgment on the merits. *See United States Smelting*, 339 U.S. at 198-99, 70 S.Ct. at 544. Similarly, we think that a

bankruptcy court's order authorizing settlement of a claim cannot constitute a final judgment on the merits for purposes of former adjudication. Therefore, the bankruptcy court's order authorizing settlement of South Florida's and Allegheny's claims cannot be given preclusive effect as a final judgment on the merits.

B.

While the court's order authorizing settlement cannot be given preclusive effect, we conclude that the order confirming the plan does satisfy the requirements of a judgment that can be given such effect. Furthermore, we hold that the doctrine of "claim preclusion"[3] applies to bar litigation of the claims made in the Wallises' adversary complaint.

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[3] In this opinion, we use the term "claim preclusion," while the bankruptcy court, in its order, cited the "law of the case" as its basis for holding the Wallises' arguments to be barred. The district court, however, framed its opinion in terms of "res judicata." For the sake of clarity, we take this opportunity to define these often misused terms.

Res judicata is frequently used to refer generically to the law of former adjudication. A former judgment can create two different types of bars to subsequent litigation, depending on whether the subsequent litigation arises from the same or a different cause of action. If the later litigation arises from the same cause of action, then the judgment bars litigation not only of "every matter which was actually offered and received to sustain the demand, but also [of] every [claim] which might have been presented." *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 319, 47 S.Ct. 600, 602, 71 L.Ed. 1069 (1927). In this opinion, we refer to this strand of former adjudication as "claim preclusion." *See Jones v. Texas Tech Univ.*, 656 F.2d 1137, 1141 n. 1 (5th Cir. Unit A Sept. 1981). If, however, the subsequent litigation arises from a different cause of action, the prior judgment bars litigation only of "those matters or issues common to both actions which were either expressly or by necessary implication adjudicated in the first." 2 A. Freeman, A. Treatise of the Law of Judgments §677, at 1429-30 (5th ed. 1925); *see Baltimore S.S.*, 274 U.S. at 319,

(Footnote continued on following page.)

1.

[5] Claim preclusion applies to an order or judgment when four conditions are satisfied. First, the prior judgment must be valid in that it was rendered by a court of competent jurisdiction and in accordance with the requirements of due process. *See Windsor v. McVeigh*, 93 U.S. 274, 277-78, 23 L.Ed. 914 (1876); *Jones*, 656 F.2d at 1141; *United States v. Hartley*, 612 F.2d 1009, 1010 (5th Cir. 1980). Second, the judgment must be final and on the merits. *See United States Smelting*, 339 U.S. at 198, 70 S.Ct. at 544; *Jones*, 656 F.2d at 1141. Third,

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(Footnote continued from preceding page.)

47 S.Ct. at 602. We refer to this strand of former adjudication as "issue preclusion." *See* Restatement (Second) of Judgments §17 comment c (1982).

Closely related to the doctrines of claim and issue preclusion is the doctrine of "law of the case." This is a

> rule of practice under which a rule of law enunciated by a federal court "not only establishes a precedent for subsequent cases under the doctrine of stare decisis, but [also] establishes the law which other courts owing obedience to it *must*, and which it itself will, normally, apply to the same issues in subsequent proceedings in the same case."

Morrow v. Dillard, 580 F.2d 1284, 1289 (5th Cir. 1978) (quoting 1B J. Moore, Moore's Federal Practice ¶0.404[1] (2d ed. 1974) (footnotes omitted)) (emphasis in original). While the law of the case does not bar litigation of issues "which might have been decided but were not," *id.* at 1290, it does require a court to follow what has been decided explicitly, as well as by necessary *implication*, in an earlier proceeding, *id.* The distinction between law of this case and claim preclusion is that the former bars relitigation of legal rules while the latter bars relitigation of claims (i.e., legal rules applied to the facts of the case). In addition, law of the case bars only those legal issues that were actually, or by necessary implication, decided in the former proceeding, while claim preclusion bars relitigation not only of claims raised but also claims that could have been raised. *Id.* Law of the case differs from issue preclusion in that the former applies only to proceedings within the same case, while the latter applies to proceedings in different cases.

there must be identity of both parties or their privies. *See Jones*, 656 F.2d at 1141. Fourth, the later proceeding must involve the same cause of action as involved in the earlier proceeding. *See Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 319, 47 S.Ct. 600, 602, 71 L.Ed. 1069 (1927); *Jones*, 656 F.2d at 1141.

[6] In this case, all four requirements are satisfied by the order confirming the plan and the adversary proceeding at issue. First, the order confirming the plan was entered by a court of competent jurisdiction and in accordance with due process. No challenge to the bankruptcy court's jurisdiction over confirmation of the plan has been, or could be asserted. Furthermore, it appears that the court complied with the procedural requirements of the bankruptcy rules by giving adequate notice of the hearing on confirmation and by properly conducting that hearing. *See* Bankr.R. 3020(b).

Second, the order constitutes a final judgment on the merits. This issue has been settled for some time: a bankruptcy court's order confirming a plan of reorganization is given the same effect as any district court's final judgment on the merits. *See Stoll v. Gottlieb*, 305 U.S. 165, 170-71, 59 S.Ct. 134, 137, 83 L.Ed. 104 (1938); *Miller v. Meinhard-Commercial Corp.*, 462 F.2d 358, 360 (5th Cir. 1972).[4]

Third, all of the parties to the adversary proceeding were parties to the confirmation proceeding, and the parties against whom the prior order is asserted (the Wallises) had a full and fair opportunity to raise their objection. A party for the purposes of former adjudication, includes "all who are directly interested in

[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

the subject matter and who had a right to make defense, control the proceedings, examine and cross-examine witnesses and appeal from the judgment if an appeal lies." 1 A. Freeman, A Treatise of the Law of Judgments §430, at 936-37 (5th ed. 1925). Thus, one who participates in a chapter 11 plan confirmation proceeding becomes a party to that proceeding even if never formally named as such. *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1051 (5th Cir. 1987); *see In re Met-L-Wood Corp.*, 861 F.2d 1012, 1016 (7th Cir. 1988).

Any "party in interest may object to confirmation of a plan." 11 U.S.C. §1128. The Wallises, as guarantors of Justice Oaks' loan from Park Bank, clearly were parties in interest,[5] and the bankruptcy court, in considering the Wallises' objection, treated them as such. Therefore, we conclude that, for the purposes of former adjudication, the Wallises were parties to the confirmation proceeding.[6] Moreover, the record indicates that the

[5] All creditors of a debtor are parties in interest. *See* 8 Collier on Bankruptcy ¶3020.04 (15th ed. 1989). A "creditor" is an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. §101(9)(A). A "claim" for the purposes of the Code means any "right to payment, whether or not such right is ... fixed, contingent, matured, [or] unmatured." *Id.* §101(4)(A). Obviously, the Wallises had a "claim," albeit a contingent or unmatured claim, which, in turn, made them "creditors" of Justice Oaks and thus "parties in interest" to the confirmation proceeding.

[6] We reach this conclusion even though the Wallises did not have an allowable claim against Justice Oaks and could not request equitable subordination or imposition of an equitable lien. As we note above, neither Park Bank nor the FDIC had foreclosed on the loan to Justice Oaks. Thus, the Wallises have never become liable on their guarantee and, at most, could only speculate as to the amount of their liability should the FDIC foreclose and attempt to sell the guest house and administration building. Under the Bankruptcy Code, "the court shall

(Footnote continued on following page.)

Wallises had a full and fair opportunity to participate in that proceeding and took advantage of that opportunity. Finally, we note that there is complete identity of parties since Allegheny and Justice Oaks, the other parties to the current proceeding, were obviously parties to the confirmation proceeding as well.

Finally, the claims made in the Wallises' adversary complaint involve the same cause of action at issue in the confirmation proceeding. Claims are part of the same cause of action when they arise out of the same transaction or series of transactions. *See* Restatement

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(Footnote continued from preceding page.)

disallow any claim for reimbursement or contribution of an entity that . . . has secured the claim of a creditor, to the extent that . . . such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution." 11 U.S.C. §502(e)(1).

Because the Wallises did not, and still do not, have an allowable claim, they could not request equitable subordination of Allegheny's claim to their own. *See* 11 U.S.C. §510 ("the court may[,] . . . under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of *another allowed claim*" (emphasis added)). Nor could the Wallises request imposition of an equitable lien since "there has to be a debt before you can . . . impose a lien." *see Flowers v. Miskoff*, 233 So.2d 201, 205 (Fla.Dist.Ct.App. 1970). The Wallises have never been indebted to anyone, nor has anyone been indebted to the Wallises.

All of this simply means that the Wallises' adversary complaint is premature and would normally be dismissed for that reason. This does not mean, however, that the Wallises could not object to confirmation of the plan and become parties to the confirmation proceeding. As we note in the text, any party in interest may object to confirmation. Although neither the Bankruptcy Code nor the rules define party in interest, it is clear that an allowable claim is not a necessary element of such a party's interest. *Cf.* 8 Collier on Bankruptcy, *supra* ¶3020.04[1]. As we explain in the text, the Wallises did have a sufficient interest in the estate to qualify them as parties in interest. Therefore, the Wallises could become bound by the court's order confirming the plan even though they had no allowable claim at the time.

(Second) Judgments §24 (1982). In this case, all of the Wallises' claims in their adversarial proceeding are based on the same transaction (the alleged fraudulent buy-out of Allegheny's partnership interest, along with the attendant misrepresentations of Rodney Propps) that gave rise, in part, to the terms of the plan. Therefore, the order confirming that plan was based, in part, on the transaction at the core of the Wallises' present claims. Consequently, the Wallises' present claims are based on the same cause of action that gave rise to their objection to confirmation of the plan.[7]

The bankruptcy court's order confirming the plan satisfies the four essential elements of claim preclusion. We next decide exactly what the Wallises are barred from relitigating in their adversary proceeding.

2.

[7] When all of the requirements of claim preclusion are satisfied, "the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties . . . not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every [claim] which might have been presented." *Baltimore S.S.*, 274 U.S. at 319, 47 S.Ct. at 602. Thus, to determine whether the Wallises are now precluded from litigating the claims advanced in their adversary proceeding, we must establish whether any or all of those claims were actually made, *or could have been made*, in their objection to confirmation. *See In re Blanton Smith Corp.*, 81 B.R.

[7] Finally, we note that the bankruptcy court's order confirming the plan did not resolve pure legal issues; instead, it determined "claims." Claim preclusion, rather than law of the case, is therefore the proper doctrine under which to analyze that order.

440, 442 (Bankr.M.D.Tenn. 1987); *Sanders v. GIAC Leasing Corp. (In re Sanders)*, 81 B.R. 496, 498 (Bankr.W.D.Ark. 1987).

The Wallises, in their adversary complaint, make two arguments in support of their claims for an equitable lien on the proceeds from the sale to Arvida and for equitable subordination of Allegheny's claim: (1) that Allegheny engaged in "fraudulent" and "inequitable" conduct, and (2) that Allegheny is not a secured creditor since it is seeking to recover its investment or capital contribution in Justice Oaks. We think that these claims were, or at least could have been, raised in the Wallises' objection to confirmation. The Wallises did raise, in their objection to confirmation, the issue of Allegheny's alleged inequitable conduct. They argued in their objection that "it is now inequitable and unfair to propose that Allegheny . . . receive a substantial portion of the debt due them, in light of the aforementioned inequitable conduct." The Wallises' objection did not expressly raise the claim that Allegheny was not a secured creditor, but it did allude to the fact that Allegheny's claim represented a claim for repayment of its partnership "interest" in Justice Oaks. The court specifically noted, in its order overruling the Wallises' objection, that the question of Allegheny's secured status had already been decided in favor of Allegheny and that it would not reconsider that decision.

[8, 9] The Wallises' objection was overruled, and they failed to appeal the order. The Wallises' adversary complaint essentially brings an impermissible collateral attack on the order confirming the plan. Because the claims raised in the Wallises' adversary complaint were already raised, or could have been raised, in their objection to confirmation, we hold that the doctrine of claim preclusion bars them from relitigating those

claims.[8] We therefore affirm the district court, in turn affirming by operation of law the bankruptcy court's dismissal of the adversarial complaint on the ground of claim preclusion.[9]

III.

[10] The bankruptcy court, citing the preclusive effect of its orders authorizing settlement and confirming the plan, overruled the Wallises' objection to Allegheny's claim. The district court affirmed on the basis of res judicata. We think that the question of former adjudication should never have been reached with regard to this objection since the Wallises had previously waived their right to object by failing to object prior to confirmation of the plan.

Under the Bankruptcy Code, "[a] claim . . . is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. §502(a) (1988). Allegheny filed a proper proof of claim,

[8] The court based its decision to overrule the objection on the law of the case as established by its order authorizing settlement. As we note earlier, however, that order was not a final judgment on the merits and therefore had no preclusive effect. *See supra* at 1548-1550. Thus, the court's decision to overrule the objection to confirmation might have been erroneous. Nevertheless, assuming all other necessary elements are present, an erroneous former judgment from which no appeal is taken may still have full preclusive effect. *See North Carolina R.R. v. Story*, 268 U.S. 288, 292, 45 S.Ct. 531, 533, 69 L.Ed. 959 (1925).

[9] As we state above, *see supra* note 6, the adversarial complaint could also have been dismissed because the claims made in it were premature. Thus, there were alternative grounds for dismissing the complaint: (1) the claims made were based on issues that were barred from relitigation by the order confirming the plan, and (2) the claims made were premature. Both the district court and the bankruptcy court relied on the first alternative, and we find no fault in their doing so. We therefore base our decision as well on that alternative, while noting that had there been no claim preclusion, we nevertheless would have affirmed the dismissal on the second alternative.

and the Wallises, as parties in interest, had the right to object to that claim, *see supra* note 5; *cf.* 3 Collier on Bankruptcy ¶502.01[2] (15th ed. 1989) (creditor of nondebtor general partner, whose partnership is debtor, is party in interest since possible exposure of general partner might hinder creditor's ability to collect). Bankruptcy Rule 3007 sets forth the procedure for filing an objection to a claim, but that rule does not provide any time limits for filing an objection. The Fifth Circuit, however, has found such a deadline implicit in several provisions of the Code. In *Simmons v. Savell (In re Simmons),* 765 F.2d 547 (5th Cir. 1985), the court considered an objection, filed after confirmation of a plan, to a secured claim. Although the plan was a chapter 13 plan, most of the court's reasoning is applicable to confirmation of chapter 11 plans. The court held that "under section [ ] 506(a) [which applies in chapter 11 proceedings], a proof of secured claim must be acted upon—that is, allowed or disallowed—before confirmation of the plan or the claim must be deemed allowed for purposes of the plan. *See* 11 U.S.C. §502(a)."[10] *Simmons,* 765 F.2d at 553. The court went on to hold that "because no objection was filed before confirmation of [the] plan, [the] claim should have been deemed an allowed secured claim for purposes of confirmation." *Id.* at 554.

[11] While there is some dispute over the breadth of the *Simmons* court's holding, we think that it at least stands for the proposition that, when the objection is based on an argument that the plan misclassified the objectionable claim, the objection must be made prior to

[10] Section 506(a) provides that when a creditor files proof of a secured claim, the value of a creditor's interest in the estate "shall be determined ... in conjunction with any hearing ... on a plan affecting such creditor's interest. 11 U.S.C. §506(a).

confirmation of the plan. *Cf.* 8 Collier on Bankruptcy, *supra* ¶3007.03, at 3007-8 ("*Simmons* ... involved claim[ ] misclassified in the plan"). We find that proposition to be compelling. Furthermore, we hold that the *Simmons* rule applies in this case to bar the Wallises' objection to Allegheny's claim. The Wallises alleged in their objection that Allegheny's claim was "not a proper and allowable claim" because it arose from the buy-out of Allegheny's partnership interest in Justice Oaks. In other words, the Wallises argued that the plan, which classified Allegheny's claim, as secured, misclassified the claim. Under the rule of *Simmons*, which we adopt today as characterized above, the Wallises lost their right to object to Allegheny's claim when the bankruptcy court confirmed the plan.[11] We therefore affirm the district court and, by operation of law, the bankruptcy court order overruling the Wallises' objection to Allegheny's claim.

IV.

Finally, we come to the bankruptcy court's order denying the Wallises' motion to require funds from the sale of Justice Oaks' property to be maintained in escrow. That motion was based on the pendency of several proceedings. With our disposition of this appeal, however, none of those proceedings remain pending. We

[11] This result is proper even though the bankruptcy court set a bar date for filing objections *after* confirmation of the plan. The Wallises argue that because they complied with the court's bar date their objection must be timely. We are not persuaded. The bankruptcy court certainly has discretion to set a bar date, but the bar established by confirmation of a plan arises from provisions of the Bankruptcy Code and cannot be overridden by the court. Therefore, a bankruptcy court may not establish a bar date for objections based on misclassification of claims after confirmation of the plan.

therefore find no reason to require maintenance of the sale proceeds in escrow and accordingly affirm the order denying the Wallises' motion.

V.

For the foregoing reasons, we affirm the district court's judgment affirming the three bankruptcy court orders.

AFFIRMED.

APPENDIX B

Order Dated June 13, 1990 of the United States Court of Appeals for the Eleventh Circuit Denying Petition for Rehearing

IN THE UNITED STATES COURT
OF APPEALS FOR THE
ELEVENTH CIRCUIT

No. 89-3016

IN RE: JUSTICE OAKS, II, LTD.
CHAPTER 11,

Debtor,

BRUCE WALLIS, KATE WALLIS,

Plaintiffs-Appellants,

versus,

JUSTICE OAKS II, LTD.,

Defendants-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

ON PETITION(S) FOR REHEARING

BEFORE TJOFLAT, Chief Judge, HATCHETT, Circuit Judge, and MORGAN, Senior Circuit Judge.

PER CURIAM:

The petition for rehearing filed by appellant's (*sic*) is denied.

ENTERED FOR THE COURT:

/s/ GERALD BARD TJOFLAT
UNITED STATES CIRCUIT JUDGE

APPENDIX C

Order Dated December 14, 1988 of the United States District Court Middle District of Florida

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case Nos. 87-1611 Civ-T-10
88-547 Civ-T-10
88-1136 Civ-T-10

IN RE:

JUSTICE OAKS II, LTD.,

Debtor.

ORDER

These consolidated cases before the Court of Appeals taken by Bruce and Kate Wallis from three Orders entered by the Bankruptcy Court during the course of Justice Oaks, II's (Debtor) reorganization under Chapter 11 of the Bankruptcy Code. The three Orders appealed from are the Bankruptcy Court's Order of August 21, 1987, denying the Wallises' motion for an order directing an escrow agent to maintain funds on deposit (case number 87-1611-Civ-T-10); the Order of March 10, 1988, dismissing the Wallises' adversary proceedings (case number 88-547-Civ-T-10); and, the Order of May 12, 1988, which denied the Wallises' objections to the claim of Allegheny Oaks of Florida, Inc. (case number 88-1136-Civ-T-10).

The Debtor, owner of a large residential development in Sarasota County, Florida known as the Oaks II, filed a Chapter 11 petition in the Bankruptcy Court in May 1986. At the time of filing, South Florida Savings Bank (South Florida) held a first mortgage on the majority of the Oaks II development while Park Bank, subsequently succeeded by the Federal Deposit Insurance Corporation (FDIC), held a first mortgage on a guest house and administration building associated with the development. Allegheny Oaks of Florida, Inc. (Allegheny) held a second mortgage on the Oaks II development.[1] The Wallises were interested parties because they had personally guaranteed the Park Bank loan.

In December 1986, Debtor filed with the Bankruptcy Court a motion seeking authorization to enter into a compromise with, *inter alia*, South Florida and Allegheny. Following notice (including notice to the Wallises) and a hearing, the Bankruptcy Court by Order dated January 12, 1987, authorized the Debtor to compromise the controversy and to execute the proposed corrected settlement agreement. The Wallises took no appeal from that Order. Pursuant to the agreement the Oaks II project was sold to Arvida Oaks, a subsidiary of the Arvida Corporation, for approximately $3,500,000 in cash and a promissory note having a principal amount of $22,000,000. Subsequently, in April 1987, the Bankruptcy Court approved the Debtor's amended disclosure statement and, accordingly, the amended plan and disclosure statement were forwarded to the creditors. On June 15, 1987, the Bankruptcy Court, after

[1] The status of Allegheny as a mortgagee of the Oaks II is disputed by the Wallises as they contend that Allegheny is not a creditor of the Debtor but instead is an equity interest holder seeking a return on its investment. Given the posture of these cases on appeal, the Court need not resolve this disputed issue.

denying the Wallises' objection, confirmed the Debtor's plan of reorganization. Pursuant to the confirmed plan the guest house and administration building were conveyed to the FDIC and the proceeds of the sale of the remainder of the property was divided as follows: up to $25,000 for taxes, up to $50,000 for administrative claims, $100,000 for unsecured creditors, $1,000,000 to Allegheny, and the remaining cash and the promissory note of Arvida to South Florida. The Wallises appealed the Order of confirmation but their appeal was dismissed as untimely by Judge Castagna. Case No. 87-1024 Civ-T-15.

In the meantime, during May 1987, prior to the final confirmation of the Debtor's plan but well after the Bankruptcy Court authorized the Debtor to compromise the controversy and execute the settlement agreement, the Wallises instituted an adversary proceeding seeking to secure an equitable lien on the proceeds of the sale to Arvida and to equitably subordinate the claim of Allegheny to their own and other claims. Subsequently, the Bankruptcy Court dismissed the Wallises' adversary proceeding and denied their objections to Allegheny's claim by Orders dated March 10, 1988 and May 12, 1988, respectively. In both Orders the Bankruptcy Court based its ruling on the fact that the issues presented by the Wallises had been previously raised in the earlier proceedings dealing with the compromise and the confirmation of the plan, and had been decided against them.

While the appeals now taken by the Wallises raise several issues, the decisive question is whether the Bankruptcy Court's Orders approving the compromise and confirming the plan are to be given res judicata effect so that the Wallises' later attempts to defeat the

claim of Allegheny are barred. If those Orders are given such effect, the remaining issues raised by the Wallises become moot.

It is well settled law that a confirmation order is equivalent to a judgment. *Miller v. Meinhard-Commercial Corporation*, 462 F.2d 358, 360 (5th Cir. 1972). Binding precedent in this Circuit has held:

> An arrangement confirmed by a bankruptcy court has the effect of a judgment rendered by a district court and any attempt by the parties or those in privity with them to relitigate any of the matters that were raised or could have been raised therein is barred under the doctrine of res judicata.

Id. (citations omitted). The Wallises argue that even though the Bankruptcy Court has approved a plan, res judicata should not apply to bar their attempts to subordinate Allegheny's claim to their own because the plan was confirmed prior to any hearing being conducted in their adversary proceeding.

The Court cannot agree. While it may be correct that the Bankruptcy Court never conducted a hearing specifically related to the Wallises' adversary proceeding, this is so only because a hearing was found to be unnecessary given the Court's earlier rulings. The record is clear that the Wallises objected to confirmation of the Debtor's plan based on the same equitable subordination argument presented in their adversary proceeding. That argument was considered and rejected by the Bankruptcy Court and the plan confirmed. The Bankruptcy Court rejected the Wallises' argument based upon its earlier ruling which had confirmed the compromise proposed by the Debtor. The Bankruptcy Court held that since it had upheld the compromise after the parties, including the Wallises, had the opportunity

to object, the Wallises were subsequently barred from raising issues which should have been raised prior to the Order approving the compromise. While the Court is fully aware that the Wallises have never had the Bankruptcy Court's decision to disallow their challenges to Allegheny's claim reviewed on the merits, this unfortunate result is unavoidable since neither the Order confirming the compromise nor the order confirming the plan is currently before the Court on appeal; indeed, the Wallises' appeal of the confirmation Order was previously dismissed as untimely filed. Case number 87-1024-Civ-T-15(C), Order of March 28, 1988. The Wallises' claims, therefore, have been previously, and finally, determined by the Bankruptcy Court and are unreviewable in this Court given the Wallises' regrettable failure to perfect the appropriate appeals. Since the Wallises' adversary proceeding and their objections to Allegheny's claim are simply impermissible collateral attacks on the Bankruptcy Court's Order confirming the plan, the Bankruptcy Court was correct in dismissing and denying them, respectively. *See Miller, supra.*

Accordingly, each of the Orders of the Bankruptcy Court appealed from in these consolidated cases is AFFIRMED. The request for oral argument is DENIED.

IT IS SO ORDERED.

DONE AND ORDERED at Tampa, Florida, this 14th day of December, 1988.

/s/ WM. TERRELL HODGES
United States District Judge

APPENDIX D

Order Dated June 15, 1987 of the United States Bankruptcy Court for the Middle District of Florida—Tampa Division on Objection to Confirmation

No. 86-1976
Chapter 11

IN THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF FLORIDA—TAMPA DIVISION

In the matter of:

JUSTICE OAKS, II, LTD.,
Debtor(s).

ORDER ON OBJECTION TO CONFIRMATION

THIS IS a Chapter 11 case, and the matter under consideration is an Amended Objection to the Confirmation of the Debtor's Plan of Reorganization filed by Bruce and Kate Wallis (Claimants). The Claimant's Objection is based on several grounds. First, it is the contention of the Claimants that permitting the F.D.I.C. to receive title to the administration building and guest house is unfair because the F.D.I.C.'s position was never determined as to what extent its claim is secured and undersecured; that because the Claimants have an alleged equitable ownership interest in the administration building and guest house, it is improper to authorize a transfer of these properties to the F.D.I.C.

free and clear of all liens and interest without giving an opportunity to these Claimants to establish the validity of their claim which was never challenged. In support of this last proposition the Claimants contend that the Plan cannot be confirmed and should not be confirmed because they recently filed an adversary proceeding seeking equitable subordination of the claims of Allegheny Oaks of Florida, Inc. (Allegheny) and South Florida Savings Bank (South Florida). The Claimants originally contended that these parties were insiders, but now concede that they were not insiders but, in fact, were investors, because the claim of Allegheny is based on the obligation assumed by Justice Oaks to repay funds invested by Allegheny in Justice Oaks and that South Florida was entitled under its contract with Justice Oaks to share in future profits in Justice Oaks, thus, South Florida is, in fact, a joint venturer with Justice Oaks. Therefore, both claims should be subordinated to the claims of other creditors. The Claimants also urge that to permit South Florida and Allegheny to receive any funds derived from the sale of the sole asset of Justice Oaks would result in a discriminatory treatment among creditors in violation of §1123(a)(4) of the Bankruptcy Code, and if the Plan of Reorganization attempts to utilize the cram-down provisions of §1129(b), the proponent of the Plan failed to comply with the requirements to obtain a determination of the application of the cram-down.

The contention of these claimants concerning the treatment of the F.D.I.C. is completely without merit. The interest claimed in the guest house and in the administration building by these Claimants is based on an arrangement whereby in exchange for their guarantee of the loan obtained by Justice Oaks from the

predecessor in interest of the F.D.I.C., Justice Oaks executed a deed to the administration building and guest house in favor of the Claimants and under the terms of the agreement the deed was to be placed in escrow and delivered only if the prime obligation which they guaranteed was not repaid in full within two years. It is without dispute that while the deed might have been placed in escrow, it was never delivered primarily because of the intervention of the bankruptcy.

Be that as it may, the Claimants' alleged claim is without legal significance simply because even assuming but not admitting that these claimants do have a cognizable equitable ownership in the administration building and the guest house, it is clear and it is without dispute that the mortgage lien of the F.D.I.C. encumbering these properties is superior and existed long before the claim asserted by the Claimants arose. The Claimants do not contend that the F.D.I.C. does not have a valid, enforceable mortgage lien against the subject properties; thus, it makes no difference whether or not the property is owned by Justice Oaks under the theory advanced by them. Moreover, the record leaves no doubt and there is nothing else to the contrary that shows that the F.D.I.C. is undersecured. For this reason, regardless of who owns the property, the interest of the Claimants would be wiped out in a foreclosure action.

As to the proposed plan to transfer to the F.D.I.C. the properties free and clear of all liens, one might argue that it would be proper to require a modification of the Plan to provide that the administration building and the guest house will be transferred to the F.D.I.C. free and clear of all liens except the interest by the Claimants. This is the only contention of these Claimants which has some merit, because it is clear that they were never

given an opportunity to litigate their claim based on alleged ownership. Therefore, it is the opinion of this Court that it would be improper to confirm this Plan without a proviso that the conveyance under the Plan to the F.D.I.C. be free and clear of all liens and interest excluding the interest of these Claimants. For this reason the Plan should be modified to provide that the Confirmation Order shall be without prejudice to these Claimants to assert whatever claim they have to the subject property in an appropriate forum after confirmation of the Plan.

Concerning the allegation of these Claimants that both South and Allegheny are insiders or equity interest holders, and therefore, their claim should be subordinated pursuant to §510(c) of the Bankruptcy Code, it is equally without merit. The difficulty with the propositions advanced by the Claimants is that the same issues have been raised early in the proceeding in the context of a Motion to Approve Compromise between Justice Oaks and South Florida. That Motion was properly noticed to all parties of interest, no objection was interposed to the compromise, and the Court after fully considering the Motion was satisfied that the compromise was appropriate and it was approved. Although the Claimants filed a Motion for Rehearing, their Motion was denied, and since no appeal was taken, the Order Approving Compromise established the law of the case. The provisions of this Plan merely incorporate the terms of that compromise. For this reason it is now too late to challenge the propriety of the compromise.

Based on the foregoing, it is

ORDERED, ADJUDGED AND DECREED that the Amended Objection to the Confirmation of the Plan as orally modified by the Debtor be, and the same is

hereby, overruled without prejudice to the Claimants to assert whatever rights they have in the subject properties in a court of competent jurisdiction. It is further

ORDERED, ADJUDGED AND DECREED that the Amended Plan proposed by the above-named Debtor filed on December 21, 1986, and as modified by Amendments filed on Januray 20, 1987 be, and the same is hereby, confirmed.

DONE AND ORDERED at Tampa, Florida on June 15, 1987.

/s/ ALEXANDER L. PASKAY
Chief Bankruptcy Judge

cc: Debtor
Debtor's Atty: Shirley Arcuri
Michael Katz, Esq.
Roy Hartman, Esq.
Robin Trupp, Esq.
Lynn Welter, Esq.
Don Stichter, Esq.
Steven B. Lictata, Esq.
S. Thomas Padgett, Esq.
Robert Glenn, Esq.
Hugh McPheeters, Esq.
George Cass, Esq.
Catherine McEwen, Esq.

APPENDIX E

Order on Motion to Dismiss Dated March 10, 1988 in the United States Bankruptcy Court for the Middle District of Florida

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 86-1976-8P1
Chapter 11

In re:

JUSTICE OAKS, II, LTD.

Debtor.

BRUCE WALLIS & KATE WALLIS,

Plaintiffs,

vs.

JUSTICE OAKS,II, LTD., SOUTH FLORIDA SAVINGS BANK and ALLEGHENY OAKS OF FLORIDA, Inc.,

Defendants.

Adv. No. 87-168

ORDER ON MOTIONS TO DISMISS

THIS CAUSE came on for hearing with notice to all parties in interest upon Motions to Dismiss the Plaintiff's Complaint filed by Justice Oaks, II, Ltd.,

South Florida Savings Bank and Allegheny Oaks of Florida, Inc., Defendants in the above-captioned adversary proceeding. The Court has considered the Motions, together with the record, and finds that the Motions are well taken and should be granted as the Complaint fails to state a cause of action for which relief can be granted as the issues raised by the Complaint have previously been addressed by this Court in its consideration of the Debtor's Motion for Approval of Sale Free and Clear of Liens and Incorporated Agreement and by the Order of Confirmation entered on January 15, 1988.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Motions to Dismiss filed by Justice Oaks, II, Ltd., South Florida Savings Bank and Allegheny Oaks of Florida, Inc., be, and the same are hereby, granted. It is further

ORDERED, ADJUDGED AND DECREED that the Amended Complaint be, and the same is hereby, dismissed with prejudice.

DONE AND ORDERED at Tampa, Florida on March 10, 1988.

/s/ ALEXANDER L. PASKAY
Chief Bankruptcy Judge

cc: Plaintiff's Attorney: S. Thomas Padgett
Defendants Attorneys: Steven Licata
Patti Medearis
Hugh McPheeters
Don Stichter
Daniel Carlton
George Cass
Michael Katz